

**Subject:** comments on critical habitat designation

**From:** mjasny@telus.net

**Date:** Mon, 14 Aug 2006 21:12:22 -0700

**To:** orcahabitat.nwr@noaa.gov

To Whom It May Concern:

Please find attached our comments on critical habitat designation for southern resident killer whales. A hard copy has also been sent by regular mail.

Thank you for your efforts in this process.

Very truly yours,  
Michael Jasny

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**By Regular and Electronic Mail**

August 14, 2006

Chief  
Protected Resources Division  
National Marine Fisheries Service  
1201 NE Lloyd Blvd., Ste. 1100  
Portland, OR 97232-1274  
orcahabitat.nwr@noaa.gov

Re: Designation of Critical Habitat for the Southern Resident Killer Whale

Dear Madam:

On behalf of the Natural Resources Defense Council (“NRDC”) and our over 600,000 members, more than 24,000 of whom reside in Washington State, we submit these comments on the critical habitat proposed, under the Endangered Species Act, for the southern resident population of killer whales. 71 Fed. Reg. 34571 (June 15, 2006).

While we believe that NMFS’ proposal takes a number of important steps toward defining critical habitat for the population, and that it rightly encompasses much of its essential habitat in the Puget Sound area, we believe, nonetheless, that it contains a number of serious defects that must be corrected in the Final Rule. In particular, we are deeply concerned about the omission of sound from the list of primary constituent elements (“PCEs”) that the agency has described. This omission runs counter to the best available science and contradicts the agency’s own prior judgment; if maintained, it would negatively affect management of this endangered population for years to come. We strongly urge NMFS to reinstate sound as a PCE in its Final Rule and to redress the other deficiencies in the Proposed Rule that we have noted below.<sup>1</sup>

I. The Omission of Sound as a Primary Constituent Element

Critical habitat provides significant benefits for endangered species and populations. It is an essential tool for recovery, it mandates a higher habitat conservation standard during Endangered Species Act (“ESA”) section 7 consultations, and it provides detailed, practical guidance on the location of areas vital to the conservation of the population. Within this scheme, the selection of primary constituent elements is integral. PCEs both

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<sup>1</sup> We are aware that comments on this proposed designation will be submitted separately by government agencies, researchers, environmental organizations, and the public. Their comments are hereby incorporated by reference. The comments that follow do not constitute a waiver of any factual or legal issue raised by any of these organizations or individuals and not specifically discussed herein.

enable agencies to identify and justify areas for designation and to help maintain the habitat value of those areas once they are defined. See, e.g., Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1227 (10th Cir. 2002) (holding that an agency cannot authorize activity that “deprives critical habitat of its primary constituent elements”); Center for Biological Diversity v. BLM, 422 F.Supp.2d 1115, 1135 (N.D. Cal. 2006) (describing BLM plan dependent on monitoring of PCEs).

In its proposal to list the southern resident population in late 2004, NMFS set forth four primary constituent elements: (1) water quality, (2) sufficient availability and quality of prey species, (3) passage conditions for migration, resting, and foraging, and (4) “sound levels that do not exceed thresholds that inhibit communication or foraging activities or result in temporary or permanent hearing loss.” 69 Fed. Reg. 76681. The first three elements remain in the agency’s proposed rule for critical habitat, which was released earlier this summer; yet, while more information is requested on the matter, the fourth item pertaining to sound levels is strangely omitted. 71 Fed. Reg. 34573.

The omission is inexplicable. NMFS’ inclusion of sound in its original list of PCEs was based on the agency’s judgment in two previous administrative processes: its decision to list the species under ESA and its design of a comprehensive Conservation Plan under the Marine Mammal Protection Act (“MMPA”). Its listing decision drew formal comments on sound and acoustic disturbance both from the public and from the agency’s peer reviewer, raising, inter alia, “specific concerns about Navy activities and sonar use.” 70 Fed. Reg. 69907. At the conclusion of that process, NMFS characterized sound and disturbance from vessel traffic as “important risk factors” affecting the viability of the southern residents. 70 Fed. Reg. 69908. Its draft Conservation Plan makes the same judgment, addressing the impacts of sound on killer whales in a 10-page literature review, defining anthropogenic noise as one of three “primary potential risk factors” (along with water quality and prey availability) affecting the population, and recommending a series of conservation measures and research activities to improve the management of acoustic impacts.<sup>2</sup> NMFS’ sudden omission of sound makes no sense in light of the agency’s previous analyses and is arbitrary and capricious.

The reinstatement of sound as a PCE is clearly required under the plain language of ESA. Both the Act and NMFS’ regulations define PCEs, in a two-plank test, to include those physical and biological features “that are essential to the conservation of a given species and that may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i); 50 C.F.R. § 424.12(b). According to NMFS, such requirements categorically can include “habitats that are protected from disturbance” (50 C.F.R. § 424.12(b)(5)); they also include factors like sufficient “space for individual and

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<sup>2</sup> NMFS Northwest Regional Office, Proposed Conservation Plan for Southern Resident Killer Whales (*Orcinus orca*) [hereinafter “Conservation Plan”] “82-92, 105-07, 126-27 (2005).

population growth, and for normal behavior,” which, for foraging killer whales, are effectively limited by the presence of noise (id. at (b)(1)).<sup>3</sup>

There can be no question, given the substantial administrative record that has already been produced in this case, including the literature review contained within NMFS’ draft Conservation Plan and the statements made in its own listing decision (see above), that protection from acoustic disturbance is essential to the conservation of southern resident killer whales. By the same token, the acoustic environment is plainly a feature of the whales’ ecology that “may require special management considerations or protection.” Indeed, NMFS’ draft Conservation Plan outlines a series of management actions, including habitat-specific restrictions on vessel traffic, that may be needed to reduce the “major risk” of acoustic disturbance and “restore the southern resident killer whale population to long-term sustainability.” Conservation Plan at 100, 105-07. Maintaining a viable acoustic environment clearly meets the Act’s two-part standard for PCEs, and NMFS’ omission of this essential feature from its critical habitat designation is contrary to law.

## II. Other Deficiencies in the Proposed Rule

As noted above, NMFS’ proposed rule contains a number of other deficiencies that limit its identification of critical habitat for the southern residents and would adversely affect its future management of the population. These deficiencies include but are in no way limited to:

- (1) The agency’s inappropriate exclusion of waters used by the U.S. Navy from designated habitat around Puget Sound;
- (2) Its failure to designate any of the population’s wintering habitat off the coasts of Oregon and central and southern Washington; and
- (3) Its failure to include areas unoccupied by the southern residents that are nonetheless essential for their conservation, such as shallow waters less than 20 feet deep that are important to forage fish, as required by 16 U.S.C. § 1532(5)(A)(i).

The agency must correct all of these problems, as well as others that have been identified by the public, for its Final Rule to be legally valid under ESA. We especially urge NMFS to restore the whales’ acoustic environment to its list of PCEs, as the best available science, the statute and regulations, and its own prior analyses and judgments clearly demand.

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<sup>3</sup> See, e.g., D.E. Bain, A model linking energetic effects of whale watching with killer whale (Orcinus orca) population dynamics (2002) (cited in NMFS’ draft Conservation Plan); C. Erbe, Underwater noise of whale-watching boats and potential effects on killer whales (Orcinus orca), based on an acoustic impact model, 18 Marine Mammal Science 394-418 (2002).

Chief, Protected Resources Division  
August 14, 2006  
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Very truly yours,

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Senior Consultant